contained in the white plastic bag were in the boot of his car and did not know the content of the two polythene bags.

It is apparent from our review of the evidence that, even discounting the evidence of See Leng Yeow and also the evidence contained in the statement, P30, the accused had not succeeded in rebutting the presumptions raised by ss 18 and 21 of the Act.

The accused therefore had at the material time a quantity of not less than 1,120.81g of diamorphine in his possession and was transporting that quantity from Lorong 7, Toa Payoh to the carpark of Balestier Plaza. Under s 17 of the Act, he is, until the contrary is proved, presumed to traffic in that quantity of drug. In *Wong Kee Chin* v *PP*[4] at p 161 the Court of Criminal Appeal said:

> When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under s 15(2) that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under s 15(2) would constitute a *prima facie* case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the types of 'transporting', the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court. (Emphasis added.)

The accused had not succeeded in rebutting the prima facie case which had been established against him.

We, accordingly, held that the prosecution had proved the charge beyond any reasonable doubt and convicted the accused.

Accused convicted.

Solicitors: *Gupta Sam & Wijaya.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Oversea-Chinese Banking Corp Ltd v Pendaftar Hakmilik, Negeri Kedah

HIGH COURT (ALOR SETAR) — ORIGINATING MOTION NO 25-37-89
KC VOHRAH J
26 MAY 1990

Land Law — Registrar's caveat — Whether registrar's discretion correctly exercised in entering caveat — Caveat entered after charges registered in respect of land — Whether claim of Department of Inland Revenue for arrears of income tax affected right of registered chargee to recoup losses secured by earlier registered charges — National Land Code 1965, ss 320(1)(b)(i), (ba) & 418 — Government Proceedings Act 1956, s 10(1)

The plaintiff was the registered chargee of the land in question. Subsequent to the registration of the four charges in favour of the applicant, a registrar's caveat was entered against the land by the Registrar of Titles at the request of the Department of Inland Revenue. It transpired that the registered owner of the land owed income tax to the department which had yet to be settled. When he defaulted in payment under the charges, the applicant applied for and obtained an order for sale of the land by public auction to recover the sum due to it. The applicant was unaware of the registrar's caveat entered against the land. When the applicant became aware of the entry of the caveat by the registrar, the applicant appealed to the High Court under s 418 of the National Land Code 1965 against the decision of the registrar to enter the caveat.

Held, allowing the applicant's appeal:

(1) The registrar cannot rely on s 320(1)(b)(i) of the Code to enter the caveat. The arrears of income tax due to the Federation from the registered owner of the land was merely an unsecured civil debt which did not give rise to a legal right in or over the land of the registered owner nor to any remedies against the land. It did not come within the meaning of the word 'interests' in s 320(1)(b).

(2) In the instant case, the registrar in entering the caveat had wrongly exercised his discretion under s 320(1)(ba). This is because once there is a charge registered in respect of the land, a registrar's caveat is incapable of being entered in respect of the land for it cannot possibly appear 'necessary or desirable' to him 'for securing that the land will be available to satisfy the whole or any part of the debt due to the Federation' since the caveat will not transform an unsecured debt into a secured debt, let alone give the debt a priority over other registered interests in the land. Instead the caveat serves to interfere with the legitimate right of the chargee to sell the land under the provisions of the Code to recoup losses secured by the charge.

(3) It was clear that the registrar did not know the value of the government debt, nor did he know the value of the debts covered by the charges. He may have known the market value of the land but that alone was not enough. Under s 320(1)(ba), the registrar is required to take into consideration material matters before he enters the caveat. His decision to enter the registrar's caveat in the instant case was thus based on insufficient facts.

(4) In the result, the discretion was not properly exercised and the decision of the registrar to enter the caveat was ultra vires the provision of s 320(1)(ba).

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 01-39 of 1990.]

Cases referred to

1 *Registrar of Titles, Johore* v *Temenggong Securities Ltd* [1976] 2 MLJ 44 (folld)
2 *Roberts* v *Hopwood* [1925] AC 578 (refd)
3 *Associated Provincial Picture Houses* v *Wednesbury Corp* [1947] 2 All ER 680 (refd)

Legislation referred to

Government Proceedings Act 1956 s 10(1)
National Land Code 1965 ss 267(1), 268(1), (3), 319(1)(b)(i), 320(1)(b)(i), (ba), 321(3)(c), 418

Mary S Nitchingham for the applicant.
Abdul Malik bin Hj Ishak (State Legal Adviser, Kedah) for the respondent.

Cur Adv Vult

KC Vohrah J: The respondent, the Registrar of Titles, State of Kedah, lodged a registrar's caveat in respect of a piece of land which had been charged to the applicant. And the applicant in this motion has appealed, under s 418 of the National Land Code 1965 ('the Code'), against the respondent's decision.

On 14 August 1986, the respondent received a letter from the Department of Inland Revenue, Alor Setar requesting the registrar to enter a registrar's caveat on a piece of land SP 64992, mukim of Alor Setar, Kota Setar belonging to one Tan Bok Lean.

The relevant portion of the letter states (translated from Bahasa Malaysia):

> Sir,
>
> Tan Bok Lean (IC No 2228552)
> Section 320 NLC — Registrar's Caveat
>
> With reference to and concerning the abovenamed, please be informed that he owes income tax to this Department which sum is yet to be settled. In order to safeguard the government's interest in this matter, please lodge a registrar's caveat pursuant to section 320 National Land Code upon the following property:
>
> | Grant | Mukim | District |
> |---|---|---|
> | SP64992 | A/Setar | Kota Setar |

On the same day the respondent received the said letter, he lodged a registrar's caveat in respect of the said land. However, at the time the registrar lodged his caveat on the said land the land had already four registrable interests registered in respect of the land. These were the four charges on the land in favour of the applicant, a bank ('the bank') which were made on the land on 8 March 1971, 16 September 1974, 23 September 1979 and 26 May 1982 respectively. These charges had been executed by Tan Bok Lean (the person named in the said letter as owing income tax) in favour of the bank for the purpose of securing repayment to the bank of various overdraft facilities granted by the bank to one Lean Teik Company.

The bank in 1987 filed an originating summons to obtain an order for the sale of the said land to recover the sums due to the bank on breach of the agreements to pay to the bank under the charges and on 3 April 1988 an order for the sale of the said land was obtained. It is clear from the affidavits filed that the bank was unaware of the registrar's caveat which had been lodged in 1986 and needless to say the registrar's caveat does not make the sale of the land viable.

A notice of entry, Form 19A dated 8 August 1986, of the registrar's caveat was sent to the chargee, the bank, on 4 October 1989. The bank being aggrieved by the decision of the registrar appealed against his decision to the High Court under s 418 of the Code. Thus this motion before the court.

The reasons given by the registrar for lodging the caveat are stated in his affidavit. He states that on receipt of the letter from the Department of Inland Revenue it appeared to him:

> ... that it was necessary to protect the interest of the Federation and it was also apparent that taking into consideration the provisions of sub-s (1)(ba) of s 320 of the National Land Code 1965, the said land belonging to the said Tan Bok Lean will be available to satisfy the whole or part of any debt due to [the Inland Revenue Department].

It appears thus that the registrar relied on two provisions of the Code when he lodged his caveat. As the learned legal adviser for the state of Kedah pointed out, the registrar relied on the provisions of para (b)(i) and para (ba) of s 320(1) of the Code for lodging the said registrar's caveat in respect of the said land.

In so far as the registrar relied on para (b)(i) of s 320(1) of the Code to lodge his caveat, it seems clear that on the authority of *Registrar of Titles, Johore* v *Temenggong Securities Ltd*[1] he could not do so. All the letter of the Department of Inland Revenue to the registrar shows is that one Tan Bok Lean is indebted to the Federation for income tax. How much is owed is not stated. It is not stated that the debt is a judgment debt. And there is nothing in the affidavit of the registrar which indicates that he acted on other information when he relied on s 320(1)(b)(i) to lodge the registrar's caveat on the said land. The debt due to the Federation from Tan Bok Lean, the taxpayer, is income tax due and payable and is merely an unsecured civil debt; it does not give rise to a legal right in or over the said property of Tan Bok Lean nor to any remedies against the same property. It is clear from *Temenggong*[1] that the debt is a mere personal claim against Tan Bok Lean and does not come within the meaning of 'interests' in para (b) of s 320(1) of the Code.

As earlier mentioned, the registrar also relied on para (ba) of s 320(1) when he lodged his caveat on the said land.

Paragraph (ba) of s 320(1) was added in 1979 with effect from 16 February 1979 by Act A444 and with it there is no requirement that the interests of the Federation or the state authority sought to be protected must be those on the land that are recognized by the Code as being registrable. On the other hand, the provision does not turn a mere unsecured debt into a secured debt in relation to the land or otherwise give it the status of a registrable interest on the land. The provision states:

> 320(1) Subject to subsection (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable —
>
> (a) ...
> (b) ...
>
> (ba) for securing that the land will be available to satisfy the whole or any part of the debt due to the Federation or the State Authority, whether such debt is secured or unsecured and whether or not judgment therein has been obtained; or
>
> (c) ...

As regards the registrar's reliance on para (ba) of s 320(1) it appears, too, that the registrar did not rely on anything beyond the letter of the Department of Inland Revenue requesting for his caveat to be lodged on Tan Bok Lean's land. The letter itself states precious little. We know that for the purposes of para (ba) of s 320(1) whether the debt is secured or unsecured is an irrelevant consideration to be taken into account. Also irrelevant is whether judgment on the debt has been obtained. But while the lack of information on these matters is not material it does not follow that other material matters should not be taken into account for the purposes of the provision.

A registrar's caveat may, under s 321(3)(c) of the Code, be cancelled pursuant to an order of the court made on an appeal under s 418 against his decision to enter the caveat. The court's role under s 321(3)(c) is, however, limited, arising out of the court being an appeal court. Since a discretion is vested in the registrar when he acts under s 320, the court's role as an appeal court is to see whether the decision of the registrar is ultra vires the provision giving him the discretion.

In the context of the ultra vires doctrine, one of the questions is whether the person exercising the discretion exercised his discretion reasonably and took into proper consideration elements which ought to have been taken into account or whether they were not taken into account. *Roberts* v *Hopwood*[2] (the *Poplar* case) illustrates this principle. Metropolitan borough councils were empowered by statute to pay to the employees 'such ... wages as [the council] may think fit'. The council of the metropolitan borough of Poplar paid to certain workmen rates of wages considerably in excess of the general level of wages prevailing in the district because they considered that the general level did not amount to a reasonable living wage. The district auditor acting under the provisions of another statute disallowed these payments and surcharged the consequent deficiency upon those councillors who had voted for this decision. The House of Lords upheld the district auditor holding that the discretion conferred upon the council by the statute must be exercised reasonably and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of the discretion. The council had in fact failed to take into account the fact that the general cost of living had substantially fallen, before they had decided to increase the wages (see also the explanation of Lord Greene MR in *Associated Provincial Picture Houses* v *Wednesbury Corp*,[3] at p 684).

Discretion is vested in the registrar under s 320(1)(ba) of the Code and from the tenor of the provision it would appear that several material matters would need to be considered by him before he enters the registrar's caveat.

The point is that when there is a charge registered in respect of a piece of land, there are concomitant legal rights which inhere in the hands of the chargee. It is inconceivable that the legislature would imperil legitimate rights of the chargee provided by the Code by allowing a registrar's caveat to freeze the register and impede legitimate procedures being prosecuted under the Code in respect of such rights.

One of the rights of the chargee, when the chargor has breached any of his agreements relating to the charge, is for him to apply to court under the Code and obtain an order for sale of the land to recoup his losses. With the registrar's caveat entered in respect of the land, his right to sell under the court order appears to be impaired. Even if a sale does go through and a certificate of sale (which under s 267(1) of Code is treated as an instrument of dealing) issued that instrument cannot be registered so long as the registrar's caveat exists in respect of the land (see s 319(1)(b)(i) of Code). And yet the registrar's caveat does not, under the Code, create a registrable interest in the land nor create any priority in favour of the Federation in respect of an unsecured civil debt which has no connection whatsoever with the land.

One can hardly sell the land with the registrar's caveat entered in respect of it. What then can the chargee do to recoup his losses in relation to the charged land? What can the Federation, at whose request the caveat was lodged, do with regard to the land in respect of its unsecured debt? Is it the purpose that a registrar's caveat be lodged to compel the chargee of the land to negotiate with the government over the debt of a third party, that which the registered owner of the land owes the government? Some arm twisting where the government is to be given priority over the chargee for the debt? That to my mind is unthinkable.

It seems to me that once there is a charge registered in respect of the land, a registrar's caveat is incapable of being entered in respect of the land for it cannot possibly appear 'necessary or desirable' to him 'for securing that the land will be available to satisfy the whole or any part of the debt due the Federation' since the caveat will not transform an unsecured debt into a secured debt let alone give the debt a priority over other registered interests in the land; instead the caveat serves to interfere with the legitimate right of the chargee to sell the land under the provision of the Code to recoup loss secured by the charge. A charge entered in respect of the land with concomitant rights arising under the Code cannot count for nought when a registrar's caveat is sought to be entered in respect of the land by the government under para (ba) of s 320(1). It is reasonable to expect the registrar not to overstep the legitimate interest of other persons or bodies who have charges and concomitant rights, all arising from the Code, on the land to their detriment.

Thus, in my view, once the registrar is aware that there is a charge on the land he cannot enter a registrar's caveat under para (ba) of s 320(1). The registrar must, in this case, have been aware of the fact that four charges had been entered in respect of the land and, with respect, he failed to take into proper consideration that fact when he entered his caveat on the land. His decision in the context of the ultra vires doctrine is not proper.

On the other hand if I am wrong in coming to such a conclusion, there is a second perspective of the matter, again in the context of the ultra vires doctrine. If the amount secured by a charge or charges on the land is less than the value of the land and a sale by order of court is held there will be a residue after deduction of the debt and other moneys as provided for under s 268(1) of the Code. This residue will have to be paid to the chargor, the landowner, under s 268(3). If it is argued and accepted that a registrar's caveat may be entered under para (ba) of s 320(1) on land notwithstanding that there are charges registered in respect of it, then perhaps the objective of allowing a registrar's caveat to be entered in respect of the same land is to prevent dissipation of this residue which has be paid to the landowner, the debtor of the Federation. If that is indeed the objective, it is this residue, not the land, which the government, perhaps, would have a stake in with preference of payment in respect of all or some of the residue bearing in mind s 10(1) of the Government Proceedings Act 1965 which provides:

> All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been from such person to any other person whomsoever.

Now neither s 10 of the Act nor any other provision in the Code confers any preference of rights in immovable property on the government in respect of an unsecured debt but some or all of the residue (after a court sale of the land) which has to be returned to the landowner could perhaps be the subject of preference of payment to the government. This would arise if by the time of the day appointed by court for the sale of the land by the chargee the Federation has obtained judgment on the debt. Viewed in this context the entering of the registrar's caveat, perhaps, is to allow the Federation time to obtain judgment on the debt under the Income Tax Act so that the debt would have preference over other debts in terms of s 10(1) of the Government Proceedings Act 1956 in respect of some or all of the residue of the sale price paid to the landowner, the debtor, after the caveat is lifted for the sale.

In regard to the second perspective that I have taken, there are matters which the registrar would have to consider under para (ba) of s 320(1). While the registrar may ignore whether a debt is secured or whether judgment has been obtained, he has, however, to consider other material matters. He has, as I have stated earlier, to consider whether 'the land will be able to satisfy the whole or any part of the debt due to the Federation'. It must appear to the registrar to be necessary or desirable that 'the land will be able to satisfy the whole or any part of the debt'. The language used in the provision, as I have previously observed, shows that the legislature recognizes that the legitimate interests of other persons or bodies who have registrable interests and concomitant legal rights on the land will first have to be considered before the registrar imposes the caveat. In the context of looking at the value of the residue that would be available to the owner of the land after a sale of the land, it is reasonable to expect the registrar to be seized of the value of the debt owed to the government, the value of the land and the value of the debt for which the charges on the land were created. He cannot act on airy fairy surmises nor can he may make unwarranted inferences from information which is scanty.

If the value of the charges in respect of the land equals or exceeds the value of the land, there cannot be any surplus for the landowner and it is hard to see how it can possibly appear to the registrar that it would be necessary or desirable for securing that the land 'will be available to satisfy the whole or part of' the debt due to the government. Thus the registrar has to have vitally important information relating to the value of the government debt, the land and the debt or debts covered by the charges before he can make a proper decision whether to enter the registrar's caveat.

So far as the debts covered by the charges are concerned, the value of the debts covered by the charges (which can be ascertained by the registrar from the charge instruments (Form 16) presented and kept in the registry)

at the time the registrar's caveat was requested to be entered may well have exceeded the market value of the land especially because of the slump in the value of land. If the value of the debts covered by the charges was in excess of the value of the land then no question of 'securing that the land will be able to satisfy the whole or any part of the debt due to the Federation by the landowner' arose. In this case it is clear the registrar did not know the value of the government debt, nor did he know the value of the debts covered by the charges. He may have known the market value of the land but that alone is not enough. With respect, the decision to enter the registrar's caveat was based on insufficient facts.

In taking either view of the two perspectives of the registrar's discretion under the ultra vires doctrine, my conclusion is that the discretion was not properly exercised. And I therefore had it set aside and allowed the application with costs.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

Reported by *Teo Keang Sood*

Tan Lay Soon v Kam Mah Theatre Sdn Bhd

Malayan United Finance Bhd v Tan Lay Soon

HIGH COURT (PENANG) — CIVIL SUIT NO 22-226-89 AND ORIGINATING MOTION NO 66-89
EDGAR JOSEPH JR J
27 MARCH 1990

Land Law — Caveats — Removal of — Application by registered proprietor and chargee under ss 326 and 327 of National Land Code 1965 — Action by caveator for specific performance claiming interest as purchaser under alleged contract of sale of land between caveator and registered proprietor — Whether caveat should be removed prior to adjudication of action for specific performance

The defendant had charged the lands to the chargee for securing the repayment of loan moneys. The defendant defaulted with repayment of the loan and the chargee commenced foreclosure proceedings to enforce the charge. In doing so, it obtained notice of two caveats lodged by the plaintiffs some five years after the registration of the chargee's charge. The defendant and the chargee brought applications to remove the plaintiff's caveats.

The plaintiff claimed a caveatable interest on the basis of an alleged binding and concluded agreement contained in the defendant's letter dated 10 March 1989 ('the letter'). Pursuant to the letter, the plaintiff had written to the defendant's solicitors and forwarded a cheque for the deposit referred to in the letter and enclosed a formal sale and purchase agreement. The plaintiff received no response from the defendant despite several reminders. The defendant's solicitor finally replied and informed the plaintiff that the deal was off. The plaintiff then issued a claim for specific performance of the alleged agreement.

The defendant claimed that the agreement to sell the lands was subject to a formal sale and purchase agreement to be entered into, and as no such agreement was concluded, there was no binding agreement between the parties. In addition, the defendant alleged that the parties had failed to agree on two of the terms contained in the draft sale and purchase agreement.

The chargee contended that their charge was created more than five years before the agreement and it was clear that the plaintiff had notice of the prior interest of the chargee and had chosen to ignore the same. The plaintiff contended that the defendant was estopped by their actions from relying on the failure to execute the sale and purchase agreement. As regards the chargee, the plaintiff contended that he was entitled to redeem the charge.

Held, dismissing the applications of the defendant and the chargee but ruling that the caveat is to remain in force until the plaintiff's claim for specific performance is adjudicated on:

(1) When an application to remove a caveat is made by the registered proprietor of the land, it is for the caveator to satisfy the court that there are sufficient grounds in fact and in law for continuing in force the caveat. A registered chargee who applies for the removal of a caveat stands in the same position as a registered proprietor.

(2) Having regard to the facts, the plaintiff's claim as caveator did disclose a serious question to be tried as to whether